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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 688

NOBLE C. POWELL,

Petitioner,

vs.

ROWLAND W. YOUNG,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Noble C. Powell, respectfully petitions this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the decision of said court rendered on the 10th day of January, 1950. The mandate and enforcement of the judgment of the Court of Appeals was on, to-wit, January 30, 1950, stayed for sixty days pending filing of petition in this Court.

The opinion sought to be reviewed is Noble C. Powell,

complainant v. Rowland W. Young, respondent, in the record herein page 495.

This Court has jurisdiction to review said decision under Title 28, U. S. Code, Section 1254 (28 U. S. C. A. Section 347).

The local statute involved is Section 165, Title 61, Code of Alabama, 1940, providing for appointment of administrator ad litem in any proceeding where estate of a deceased person must be represented and executor or administrator is adversely interested, and is set out on page 17 of brief in support of this petition.

Summary Statement of Matter Involved

This is an action at law brought in the District Court of the United States for the Northern Division of the Middle District of Alabama by Noble C. Powell, petitioner, against Rowland W. Young, respondent herein, to have certain gifts of personalty and a deed to realty set aside and declared to be null and void and of no effect, made by the deceased donor to respondent, on the ground of undue influence and mental incapacity.

This case challenges the right of a citizen and resident of the State of Maryland, one of the residuary legatees of a will admitted to probate in Alabama, to sue a citizen and resident of the State of Alabama, who is also a residuary legatee under the same will, in the Federal Courts of Alabama to set aside a gift of personalty in the sum of $44,000.00 and a deed to realty consisting of 325 acres of land without joining the personal representative of the deceased donor's estate and without joining the other heirs and legatees of said estate. The respondent is also the donee and the personal representative, but he was not sued in his representative capacity.

Petitioner filed suit against respondent in the District

Court of the United States for the Northern Division of the Middle District of Alabama alleging diversity of citizenship and the requisite amount in controversy. The complaint averred the death of the donor leaving a last will and testament and an estimated estate of around $75,000. The names, ages, residences and conditions of the other devisees and legatees under the will of the deceased donor were set forth in the complaint but they were not made parties to the suit.

The complaint alleged that (1) the gift of $44,000.00 and the deed to the real estate to respondent were made while the deceased donor was of unsound mind, and (2) that the gift and deed were products of undue influence exerted upon the deceased donor by the donee, the respondent in the action.

The prayer of the bill sought a decree invalidating the alleged gift of $44,000.00 and cancellation of the deed and that these assets be paid to the estate for distribution under the provisions of the said will—the estate being open and pending in the Probate Court of Lowndes County, Alabama (R. 2-20).

The respondent moved to dismiss the action on several grounds all adding up to (1) want of indispensable parties whose joinder would destroy diversity and deprive the court of jurisdiction and (2) petitioner was not the proper party to bring the action as the law of Alabama gave the cause of action solely to the personal representative (R. 21-23).

The District Court denied respondent's motion to dismiss the action and decreed that the bringing in of the absent parties, made the basis of the motion, would deprive the court of jurisdiction. The District Court held that a bill of complaint should not be dismissed because other parties have not been made parties to the controversy,

if the issues between the parties before the court can be adjudicated without adversely affecting the rights of the absent parties and decreed that petitioner was the proper party to bring this cause of action and that there were no other indispensable parties to the action (R. 23-25).

The cause then came on for hearing on its merits and resulted in a decree invalidating the gift of $44,000.00 and the cancellation of the deed to the realty upon the ground of undue influence exerted upon the donor by respondent, and the respondent was directed to pay these assets to the estate for distribution in accordance with the terms and provisions of the last will and testament of the deceased donor of which estate he is the executor (R. 481-488).

Respondent gave notice of appeal to the Circuit Court of Appeals for the Fifth Circuit under Rule 73(b) and executed a supersedeas and appeal bond in the sum of $30,000.00 (R. 488-490).

Upon submission of the cause in the United States Court of Appeals for the Fifth Circuit on October 19, 1949, the Circuit Court rendered a judgment or decision reversing the judgment or decision of the District Court and dismissed the cause for want of jurisdiction on the twofold ground that (1) the cause of action did not belong to petitioner and (2) absence of indispensable parties whose joinder would destroy diversity and oust federal jurisdiction (R. 495). The Court of Appeals did not reach the merits of the controversy.

The Questions Which Are Presented for the Supreme Court's Consideration:

1. Whether local rules control the constitutional right of a citizen of Maryland to sue a citizen of Alabama in the United States Courts in Alabama.

2. Whether or not Federal jurisdiction is determined by federal rules rather than state rules.

3. Whether or not the question of indispensability of parties is a matter controlled exclusively by Federal rules when suing in the Federal Courts.

4. Whether the real party in interest rule of local law controls actions in Federal Courts.

Reasons for Granting the Writ

A

1. The decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case is in conflict with the principles established by the decisions of this Court.

2. The decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case is in conflict with the decisions of the Circuit Court of Appeals for the Second, Fourth, Fifth, Sixth and Seventh Circuits.

3. The Circuit Court of Appeals for the Fifth Circuit in the instant case has decided an important question of local law in a way probably in conflict with applicable local decisions.

4. The decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case closes the door of the Federal Courts to citizens of other states under the diversity clause of the Federal Constitution and statutes governing jurisdiction because of a misconception of the principles established by the decisions of this Court and the decisions of the Circuit Court of Appeals for the Second, Fourth, Fifth, Sixth and Seventh Circuits and because of a misconception of local laws and rules.

B

1. The decision in the present case is in conflict with and contrary to the principles established by the following decisions of this Court:

Payne v. *Hook,* 74 U. S. (17 Wall.) 425, 19 L. Ed. 260 (1869);

Horn v. *Lockhart,* 84 U. S. (17 Wall.), 21 L. Ed. 657 (1873);

Waterman v. *Canal-Louisiana Bank and Trust Co. et al.,* 215 U. S. 33, 30 S. Ct. 10, 54 L. Ed. 80 (1909);

Princess Lida v. *Thompson,* 305 U. S. 456, 59 S. Ct. 275, 281, 83 L. Ed. 285, 292;

Sutton v. *English,* 246 U. S. 199, 38 S. Ct. 254, 62 L. Ed. 664;

Borer v. *Chapman,* 119 U. S. 587, 7 S. Ct. 342, 30 L. Ed. 532.

2. The decision of the Circuit Court of Appeals in the present case is also in conflict with the decisions of the Circuit Court of Appeals for the Second, Fourth, Fifth, Sixth and Seventh Circuits in the following cases:

Roos v. *Texas Co.,* 23 F. 2d. 171 (C. C. A. 2nd, 1927);

Oxley et al. v. *Sweetland,* 94 F. 2d. 33 (C. C. A. 4th, 1938);

Seeley et al. v. *Cornell et al.,* 74 F. 2d. 353 (C. C. A. 5th, 1935);

Atwood et al. v. *National Bank of Lima,* 115 F. 2d. 861, (C. C. A. 6th, 1940);

Williams v. *Crabb et al.,* 117 Fed. 193, 40 L. R. A. 125, (C. C. A. 7th, 1902);

Texas Company v. *Wall,* 107 F. 2d. 45, 50 (C. C. A. 7th, 1939);

D. Korwin v. *First National Bank of Chicago, et al.,* 156 F. 2d. 858 (C. C. A. 7th, 1946).

3. The decision of the Circuit Court of Appeals in the instant case conflicts with the following decisions of the State of Alabama upon an important question of local law, and the decision is also grounded upon a misconception of the holding in these cases:

Trotter v. *Brown,* 232 Ala. 147, 150, 167 So. 310;
Ex parte Baker, 118 Ala. 185, 191, 23 So. 996;
Costephens et al. v. *Dean, et al.,* 69 Ala. 385;
Dugger v. *Tayloe,* 60 Ala. 504;
Faulk v. *Money,* 236 Ala. 69, 181 So. 256.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Fifth Circuit had in the case numbered and entitled on its docket, No. 12,483, Rowland W. Young, appellant v. Noble C. Powell, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and the judgment herein of the said United States Circuit Court of Appeals for the Fifth Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated —— ——, 1950.

NOBLE C. POWELL,
By HILL, HILL, WHITING & HARRIS AND JOHN O. HARRIS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 688

NOBLE C. POWELL,

Petitioner,

vs.

ROWLAND W. YOUNG,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Court Below

The opinion in the United States Circuit Court of Appeals for the Fifth Circuit is not reported, but was rendered by said Court on January 10, 1950, and is found on pages 495-504 of the record herein.

Jurisdiction

The statutory provision which is believed to sustain jurisdiction of this Court is Title 28, U. S. Code, Section 1254 (28 U. S. C. A. Section 347).

Statement of the Case

This has already been stated in the preceding petition under the *Summary Statement of Matter Involved* (pp — 2-4), which is hereby adopted and made a part of this brief.

Specification of Errors

1. The United States Court of Appeals for the Fifth Circuit erred in holding that petitioner, one of several legatees, did not have the right, without joining as plaintiffs the other legatees and a representative of the estate, to sue alone to set aside certain gifts of personalty and a deed to realty done and made by decedent to the respondent herein, who is the personal representative of the deceased donor's estate.

2. The United States Court of Appeals for the Fifth Circuit erred in holding that petitioner was not the proper party plaintiff to prosecute an action to set aside gifts of personalty and a deed to realty and in holding that such action could only be prosecuted in the name of the personal representative of the deceased donor's estate.

ARGUMENT

Summary of Argument

POINT A.

Federal Court has jurisdiction based on diversity of citizenship, jurisdictional amount being present, notwithstanding omission of parties, if the court can do justice between the parties before it without injuriously affecting the rights of such absent parties. The "indispensability of parties" in Federal Courts is determined by Federal rules.

POINT B.

State procedure cannct affect substantive rights in Federal Courts and a state statute requiring action to be prose-

cuted in the name of the real party in interest is not binding on Federal Court.

Point A

The rule as to indispensability of parties must be determined by Federal rather than local rules.

In *Payne* v. *Hook,* 74 U. S. (17 Wall.) 425, 19 L. Ed. 260, this Court said:

> "The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by state legislation, and is uniform throughout the different states of the union."

And then the court went on to say:

> "But it is said the proper parties for a decree are not before the court, as the bill shows there are other distributees besides the complainant. It is undoubtedly true that all persons materially interested in the subject-matter of the suit should be made parties to it; but this rule, like all general rules, being founded in convenience will yield, whenever it is necessary that it should yield, in order to accomplish the ends of justice. It will yield, if the court is able to proceed to a decree and do justice to the parties before it, without injury to absent parties, equally interested in the litigation, but who cannot conveniently be made parties to the suit.
>
> "The necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever."

To like effect is the holding in *Horn* v. *Lockhart,* 84 U. S. (17 Wall.) 570, 21 L. Ed. 657.

In *Waterman* v. *Canal-Louisiana Bank and Trust Co.,*

et al., 215 U. S. 33, 30 S. Ct. 10, 54 L. Ed. 80, this court said:

> "The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court, without injuriously affecting the rights of such absent party.
>
> "If the court can do justice to the parties before it without injuring absent parties, it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties, without prejudice to such absent parties."

In *Williams* v. *Crabb*, 117 Fed. 193, 40 L. R. A. 125, (C. C. A. 7th, 1902), the United States Court of Appeals for the Seventh Circuit, in dealing with the indispensability of parties in an action to set aside a will because of fraud and to set aside and cancel a deed because of undue influence, said:

> "Nor can the objection prevail that Helen Alexander is not made a party defendant or a party complainant with her brother, having an equal interest in the estate of her sister with the complainant. She is not an indispensable party. The ground of demurrer is that she was not made a defendant, but she has no interest adverse to that of the complainant, and so should not be made a defendant. It is not objected that she is not made a co-complainant. She would have been a proper party complainant, and possibly a necessary, as distinguished from an indispensable party. (Citing cases.) By the original bill Helen Alexander was made a party defendant, and she was alleged to be a citizen of Illinois. In the amended bill she was not made a party, nor is there any allegation as to her citizenship, but the demurrer alleges that she is a citizen of Illinois.

> The briefs of both sides concede that she is a citizen of the same state with the defendants, and we think the court may assume that to be the fact; so that if she were made a party, the requisite citizenship to give the federal court jurisdiction would be wanting, as the court would, in determining the question of jurisdiction, arrange the parties according to their interests in the controversy, and, her interests being with the the complainant, she would be placed on that side, which would deprive the court of jurisdiction, as one of the complainants in that case would be a citizen of the same state with the defendants. It seems clear that under the adjudications that would be a good reason that the court would not require her to be brought in. * * *"

In *Oxley et al.* v. *Sweetland,* 94 F. 2d. 33 (C. C. A. 4th, 1938), the United States Court of Appeals for the Fourth Circuit, in treating the indispensability party question, said:

> "Where no interests of the absent parties will be determined by the suit and no action can be taken by the court which will make a determination in their favor contrary to equity and good conscience, there is no reason why the court should not proceed to determine the rights of the parties before it, even though in doing so it may decide questions of fact or law in which absent parties are interested. If this were not true, every person having any interest in the determination of a question of law or fact would be an indispensable party to every suit in which such question might be brought in issue, a manifest absurdity."

Like holdings were pronounced in the following cases:

Seeley et al. v. *Cornell et al.,* 74 F. 2d. 353, (C. C. A. 5th, 1935;

Atwood et al. v. *National Bank of Lima,* 115 F. 2d. 861, (C. C. A. 6th, 1940);

Texas Company v. *Wall, et al.*, 107 F. 2d. 45, 50, (C. C. A. 7th, 1939).

Point B

State procedure cannot affect substantive rights in Federal Courts and a state statute requiring actions to be prosecuted in the name of the real party in interest is not binding on Federal Courts.

The general rule is that the personal representative is the only one authorized by law to sue on a claim relating to personal property belonging to an estate. This rule has application only to actions against third persons who are indebted to the estate. This rule has no application to an action, as here, by a legatee against one who happens to be the personal representative of an estate for his delicts.

The only matter involved in this litigation as between petitioner and respondent is the restoration of the corpus of the estate in which both are legatees, and the establishment of petitioner's quantum in the replaced assets upon final settlement in the Probate Court of Lowndes County, Alabama, under the terms and and provisions of the will, after the payment of all charges and expenses of administration.

In *Ross* v. *Beacham,* 33 F. Supp. 3, the court said:

> "Where diversity of citizenship exists and the requisite amount is in controversy, the Supreme Court has sustained the right of Federal Courts of Chancery to exercise original jurisdiction in favor of creditors, legatees and heirs to establish their claims and have a proper execution of the trust as to them. The only qualification in the application of this principle is that the courts of the United States in the exercise of their jurisdiction over the parties cannot seize or control property while in custody of a court of the state. This exception does not apply in the instant case. Diversity of citizenship and jurisdictional amount are present in this case, and this court has jurisdiction of the con-

troversy. Sutton *v.* English, 246 U. S. 199, 38 S. Ct. 254, 62 L. Ed. 664; Waterman *v.* Canal-Louisiana Bank & Trust Co., 215 U. S. 33, 30 S. Ct. 10, 54 L. Ed. 80; Borer *v.* Chapman, 119 U. S. 587, 7 S. Ct. 342, 30 L. Ed. 532; Dixon, as Receiver, etc. *v.* Cleveland, as Executrix, etc. D. C. S. C., 31 F. Supp. 1010."

The distinction was clearly pointed out in *Small* v. *Frick,* D. C. S. C., 40 F. Supp. 778, which was a suit by the heirs at law against a third person for profits due the estate and the court held that the action belonged solely to the personal representative, but went on to say:

> "This conclusion in no wise conflicts with the decision in Ross *v.* Beacham, D. C., 33 F. Supp. 3, in which case the heirs brought suit against the administrator for his delicts. If, with an existing administrator of the estate of W. G. Ross, the heirs in Ross *v.* Beacham had been undertaking to sue *a third party* to collect debts due the estate of W. G. Ross, it would necessarily have been held that they did not have the right to maintain the action." (Emphasis supplied.)

The local law is the same as that pronounced above.

In the case of *Dugger et al.* v. *Tayloe et al.,* 60 Ala. 517, the Supreme Court of Alabama said:

> "The general rule in a court of equity is, that neither creditors, nor distributees, nor legatees, can maintain a bill against debtors of an estate, to subject debts they may owe to the satisfaction of their demands. There is a want of privity between them and the debtors, and it would introduce confusion in the administration of the assets, and displace the power of the personal representative. There are exceptions to the rule; as where there is collusion between the debtors and the personal representative; or where he is insolvent, and there is just apprehension of loss, if he is permitted to collect them; or, as is said by Chancellor Kent, in Long *v.* Majestre, 1 John. Ch. 306, "where

there is some other special case not exactly defined."—1 Dan. Ch. Pr. 322-24; Story's Eq. Pl. Sections 178, 227, 514."

In the case of *Costephens et al.* v. *Dean et al.*, 69 Ala. 385, the Supreme Court of Alabama said:

"As a general principle, the law recognizes an executor or administrator as the only representative of the personal assets of a decedent. His title to them is exclusive, and whatever may be the lapse of time intervening between the death of the owner and the grant of letters of administration, or letters testamentary, the title relates to the death, and he may maintain suits to reduce them into possession, whether they were at the time of the death, choses in action, or were subsequently taken and converted. 1 Brick Dig. 932, Sections 261-64. In trust he holds them, first for the payment of debts, and secondarily, in cases of intestacy, for distribution to the next of kin, or where they have been bequeathed, for the benefit of legatees. The trusts are charged upon the legal title, and that resides solely and exclusively in the personal representative, until distribution is made, or by an assent to legacies, he may part with it.

"In the subject-matter of a suit involving the personal assets, distributees or legatees have an interest differing only in degree from that of creditors. *In respect to such assets, however, they can not generally sue any other person than the executor or administrator,* because there is a want of all proper privity between them and persons who may have possession, or may have converted them, or when the assets are in the form of debts, between them and the debtors. * * *" (Emphasis supplied.)

To like effect is the holding by the Supreme Court of Alabama in the case of *Faulk* v. *Money et al.*, 236 Ala. 69, 181 So. 256. In all of the Alabama cases cited by the Court of Appeals upon the proposition that the personal representative of the deceased donor's estate was the proper

party plaintiff, with the exception of the case of *Faulk* v. *Money, supra,* deal with actions by heirs, legatees and distributees against *third persons* for debts due the estate but most of these same cases point out the exception to the general rule that only the personal representative of the estate can bring suit. These cases clearly recognize that the heirs, legatees and distributees can sue the executor or administrator in their own names. The statute of Alabama, made so much of in the Circuit Court of Appeals, is Title 61, Section 165, Code of Alabama, 1940, which is as follows:

> "Section 165. When administrator ad litem appointed.—When, in any proceeding in the probate or circuit court, or other court having equity jurisdiction, the estate of a deceased person must be represented, and there is no executor or administrator of such estate, or he is interested adversely thereto, it shall be the duty of the court to appoint an administrator ad litem of such estate for the particular proceeding, without bond, whenever the facts rendering such appointment necessary shall appear in the record of such case, or shall be made known to the court by the affidavit of any person interested therein."

It will be seen from a casual reading of the above section that the proceeding must be actually pending before a court is called upon to appoint an administrator ad litem in cases where such an appointment is warranted. The Supreme Court of Alabama in the case of *Ex Parte Baker,* 118 Ala. 185, 23 So. 996, held:

> "An administrator ad litem should not be appointed in the Chancery Court, *in any event,* when the court is competent to render complete justice without incurring the unnecessary, and often very considerable, expense to the estate by such an appointment. It does not appear that there is any necessity for the appointment of such an administrator in this case." (Emphasis supplied.)

In the case of *Trotter* v. *Brown,* 232 Ala. 147, 167 So. 310, the Supreme Court of Alabama said:

> "*If the grantor conveyed the legal title by conveyance,* no administrator is necessary, nor need the estate be represented by administrator ad litem. This was shown in our opinion. *But if the legal title did not pass, the estate of the deceased must be represented in such a suit.* If there is no administrator, the estate may be represented by an administrator ad litem." (Emphasis supplied.)

We respectfully submit that the Circuit Court of Appeals for the Fifth Circuit has misapplied the local law of Alabama to the facts in this case. The gift to the respondent in the sum of $44,000.00 and the deed to the 235 acres of land were not assets of the deceased donor's estate at the time of the filing of the complaint in the United States District Court. Title to the money and title to the deed had passed from the deceased donor to the respondent herein. Therefore, under the law of Alabama, an administrator ad litem could not be appointed and the cause of action properly belonged to petitioner. Until the gift of money and the deed to the land were set aside, they could not be assets of the estate. This fact renders inapt all the Alabama decisions cited by the Court of Appeals in support of the contention that the cause of action belonged to the personal representative and not to petitioner.

Conclusion

We respectfully submit that the United States Court of Appeals for the Fifth Circuit grievously erred in reversing and dismissing this cause of action. In doing so, that court ignored the principles of law announced by this Court in the cases hereinabove cited in the petition and brief and has denied to a citizen of Maryland his constitutional right

to seek redress of his grievances in the United States Courts sitting in Alabama. The decision of the United States Court of Appeals for the Fifth Circuit in the instant case is not only grounded in error upon a misconception of the principles announced by this Court in the cases cited, but the decision is also in conflict with the decisions of several of the other circuits, cited above, which have consistently followed the decisions of this Court. The instant decision is also grounded upon a misconception of the holdings of the Supreme Court of Alabama in dealing with the real party in interest rule.

How any court can say that a gift of money and a deed of gift to land become assets of the deceased donor's estate is beyond our power of comprehension. A gift tax was paid the United States Internal Revenue Department on the $44,000.00 and yet the United States Court of Appeals for the Fifth Circuit held this money was an asset of decedent's estate. Title to the money and title to the land passed from the donor (deceased) to the donee (respondent herein) and neither could be assets of decedent's estate; and under the law of Alabama an administrator ad litem can never be appointed in cases where title has passed.

We respectfully urge this Court to grant the writ of certiorari and review the judgment of the Court of Appeals for the Fifth Circuit to the end that all conflicts as to Federal jurisdiction and ownership of causes of action in cases of this kind will be forever settled.

Respectfully submitted,

HILL, HILL, WHITING &
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JOHN O. HARRIS,
Attorneys for Petitioner.